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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 420

In the Matter of the Application
of
CHARLES COLACICCO
to vacate a seizure in rem of an automobile.

CHARLES COLACICCO,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows to this Honorable Court and alleges:

This petition is for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review an order made and entered on the 5th day of June, 1944, affirming an order of the United States District Court for the Southern District of New York made and entered on the 22nd day of December, 1943. Said order

of the District Court dismissed the petition, of Petitioner, to vacate the alleged illegal seizure of his automobile by the Alcohol Tax Unit of the Treasury Department, the administrative forfeiture thereof, and for the return of said automobile to petitioner. The ground for the dismissal was that the Court had no jurisdiction.

Summary Statement of the Matter Involved

Petitioner was arrested on or about the 1st day of June, 1942 upon the charge that he was transporting fuel oil pursuant to a conspiracy, to violate the Internal Revenue Act, in operating a "still" for the illegal manufacture and sale of intoxicating spirits for beverage purposes.

Immediately thereafter, at another location, his automobile, then in a garage in Middletown, New York, was seized by the agents of the Alcohol Tax Unit; thereafter it was appraised at $475 and administratively forfeited. He offered a $250 cost bond, referred to in Section 3724 (c) of the Internal Revenue Code, to the Treasury Department and filed a petition for a remission of the forfeiture, but said petition and a supplemental petition were denied upon the ground that it was not shown satisfactorily that relief under the Statute should be granted and because the claim and cost bond were not filed within the alleged statutory period.

Petitioner thereafter commenced this proceeding in the District Court upon a written petition and notice of motion served upon the United States Attorney for the Southern District of New York, who appeared and argued in opposition. The Court thereupon ordered a hearing, for the presentation and determination of the

questions of fact and law, before him.

On the hearing, the Government appeared and presented evidence of the seizure, the appraisal and the alleged illegal use of the automobile.

Petitioner's counsel cross-examined the Government witnesses. Petitioner and an expert witness testified for petitioner, and both were cross-examined by the United States Attorney.

It clearly appeared by the testimony of the Government appraiser that the appraisal was erroneously based upon an assumption of a non-existent fact, *i. e.*, that the automobile was a bootlegger's car. He admitted that had he known the car was not used by a bootlegger carrying liquor, he would have appraised its value at more than $500.

No testimony as to the publication of the notice required by Section 3724 (b) was presented and it appeared that the Collector did not sell the automobile at public auction as required by Section 3724 (d), nor did he sell it at all. He assigned it for use to a Government Agency under the alleged authority of Title 40, U. S. C. A., Section 304 (h).

The opinion of the District Judge, in spite of the dismissal of the petition upon the specific ground of lack of jurisdiction, contained conclusions upon other features of the matter, such as: (1) the nature of petitioner's actions leading to his arrest; (2) that the publication not testified to will be presumed to have been done, and (3) that the appraisal was sufficient to warrant the Collector in proceeding under Section 3724 to administratively forfeit the automobile.

The order appealed from specifically provided that the basis of the dismissal of the petition was the Court's

lack of jurisdiction.

The opinion of the District Judge dismissing the petition stated it was on the ground that "the Court has no jurisdiction over the officers who made the seizure, or the party who now concededly has the possession of the automobile, nor the property itself, and therefore could not direct the return thereof."

Petitioner, after moving for a rehearing and reconsideration, appealed from the order denying same entered thereon and upon the dismissal of the petition.

It was stipulated that the Record on Appeal be abbreviated by the elmination of all of the testimony excepting that of the Government appraiser.

Petitioner designated as his Points on Appeal the following:

POINT I

The District Court of the United States has jurisdiction over the seized automobile and may compel the return thereof.

POINT II

If the administrative forfeiture proceeding taken herein is exclusive and precludes the United States District Court from taking jurisdiction herein, the applicable sections of the Internal Revenue Code are unconstitutional in that they deprive petitioner of his property without due process of law.

POINT III

The District Court erred in denying petitioner the relief requested or in failing in the alternative to direct the United States attorney to file a libel proceeding against the seized automobile within a stated period of time or return the seized automobile to petitioner.

The Circuit Court of Appeals affirmed the order appealed from, although, as petitioner's counsel understands the opinion, it held, contrary to the conclusion of the District Judge, that the District Court has jurisdiction herein.

Questions Presented

1. Where a petition is dismissed by a District Court upon the ground that the Court has no jurisdiction, are conclusions as to other matters set forth in his opinion valid to the extent that the Circuit Court of Appeals may accept them as binding upon appellant and base its decision in part thereon.

2. Where a respondent interposes no pleading, but contends, upon a hearing ordered by the District Court upon a petition to vacate an alleged illegal seizure and to direct the return of the seized property, that the Court has no jurisdiction in the matter and the Court dismisses the petition upon such ground, may the Circuit Court of Appeals review other conclusions set forth in the opinion of the District Judge, not necessary to the determination made by him that the District Court has no jurisdiction, and affirm the order appealed from on the basis of said review and acceptance of said alleged *obiter dicta* although the said Circuit Court of

Appeals finds that the District Court was in error when it held it had no jurisdiction.

3. Is the instant proceeding one in Admiralty, and if so, did the Circuit Court of Appeals fall into error by not directing proof of the question of the Collector's compliance with the provisions of the Internal Revenue Code in the Administrative Forfeiture proceedings taken by him to forfeit the automobile owned by petitioner?

4. If the instant proceeding is not in Admiralty did the Circuit Court of Appeals, after finding that the District Court had jurisdiction, fall into error by failing to remand the case for further proceedings to determine whether the Collector complied with the provisions of the Internal Revenue Code in the Administrative Forfeiture proceedings taken by him, to forfeit the automobile owned by petitioner?

5. Did the Circuit Court of Appeals fall into error when it assumed that the notice required under Section 3724 (b) of the Internal Revenue Code to appear and claim the car within 30 days was duly published.

6. Did the Circuit Court of Appeals fall into error when it concluded that Colacicco raised no question as to the legality of the seizure.

7. Did the Circuit Court of Appeals fall into error when it concluded that Colacicco raises no question that the automobile was assigned for governmental use instead of selling it at public auction on ten days notice, as required by Section 3724 (d) of the Internal Revenue Code.

8. Did the Circuit Court of Appeals fall into error

when it concluded that the District Judge dismissed the petition because the forfeiture was within the terms of the statute.

9. Do the provisions of Section 3724 of the Internal Revenue Code afford due process of law in spite of the failure to afford an owner of seized property the opportunity to come into Court and contest the claim of the Collector upon the ground that he has not complied with the provisions of said statute, and upon the ground that the Government appraisal was erroneous and invalid?

10. Was the forfeiture of petitioner's automobile a violation of his rights under the Constitution of the United States in that although the property was concededly of the value of more than $500, as appears from the testimony of the Government Appraiser, the learned Courts below upheld the administrative forfeiture under Section 3724 of the Internal Revenue Code instead of vacating same and directing that a Libel be filed against the automobile pursuant to Section 3723 of the Internal Revenue Code.

11. Was the petitioner deprived of his property without due process of law in violation of his rights under the Constitution of the United States by reason of having been prevented from coming into a judicial or quasi-judicial proceeding to defend the claim against his automobile upon the merits and upon the ground that the Collector did not comply with the jurisdictional prerequisites provided by Congress in Sections 3723 and 3724 of the Internal Revenue Code,

Reasons for Granting the Petition

1. The questions presented involve the interpretation of Internal Revenue laws.

2. The questions presented involve the interpretation of laws which deprive a citizen of the remedy of replevin and purports to substitute a remedy in lieu thereof so that he may assert his claims and defend himself and his property against accusations.

3. The questions presented involve the interpretation of laws and the judgments and orders of the United States Courts regarding the remedy and procedure asserted and taken by a citizen, for the purpose of recapturing his property alleged to have been seized and forfeited without warrant or notice or due process by agents of the Government of the United States, and for the purpose of defending himself and his property against the unproven charges of the said agents.

4. The questions presented appear to be novel and do not seem to have ever been decided by this Court.

5. The questions presented involve matters of supreme importance in practcie and procedure on due process, the determination of which, by this Court, may result in the saving of a multiplicity of proceedings in the Courts below and the expenditure of time and labor incident thereto.

Conclusion

It seems clear, from a reading of the opinion of the Circuit Court of Appeals in the instant case, that the District Courts have jurisdiction over petitioner's property seized by the Alcohol Tax Unit and it likewise seems clear that the dismissal of the petition filed by petitioner in the District Court was solely upon the ground that the District Court had no jurisdiction. Nevertheless, as petitioner understands the basis of the disposition of the appeal by the affirmance of the order appealed from, it has been held in effect that the proceedings by the Collector were in compliance with the provisions of Sections 3723 and 3724 of the Internal Revenue Code, although (1) the appraisal was clearly erroneous and (2) no proof of compliance was produced by the Government in answer to the allegations of the petition to the effect that the Collector did not comply with the said provisions.

Petitioner respectfully urges that the situation thus created is an anomoly and as a result thereof he has not been afforded due process of law.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of this Court directed to the Circuit Court of Appeals for the Second Circuit pursuant to the authority of Title 28, U. S. Code, Section 347 (a) [Judicial Code, Section 240 (a)] to bring before this Court for review a full and complete transcript of the record of the proceedings herein as contained in the Transcript of the Record filed in the said Circuit Court of Appeals, and that petitioner have such other and further relief as to the Court may seem just

and proper in the premises.

Dated: New York, August 29th, 1944.

Respectfully submitted,

CHARLES COLACICCO,
Petitioner.

State of New York,
City of New York,
County of New York, ss.:

CHARLES COLACICCO, being duly sworn, deposes and says: That he is the Petitioner in the foregoing Petition. That he has read the Petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHARLES COLACICCO.

Sworn to before me this
29th day of August, 1944.

MARION S. WILCOX,
Notary Public, Queens County.
Queens Co. Clk's No. 4106, Reg. No. 225W
Certificate filed in
N. Y. Co. Clk's No. 999, Reg. No. 569-W-5
Commission expires March 30, 1945.